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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-82

MICHAEL ANTHONY TOMEO,
Petitioner,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Tenth Circuit

REPLY BRIEF FOR PETITIONER

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THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE CONFLICT AMONG THE CIRCUITS WHICH THE GOVERNMENT NOW CONCEDES

1. A conflict among the Circuits as to a significant issue of statutory interpretation in the Federal criminal law was the primary ground of this petition. In response, the Memorandum for the United States in Opposition ("Opp.") seeks to obfuscate the issue and pleads confession and avoidance.

It confesses that there is a conflict: "We concede that that is a dispute among the circuits on the reading of the statute" (Opp. 3). Nevertheless it opposes a grant of the petition because it does not deem this case an appropriate one for resolution of the admitted conflict. But as we shall demonstrate, the Government's position is bottomed upon a misconception of the record in this case.

The Government seeks to persuade the Court that the interpretation of 18 U.S.C. §1084(a) – as to which there is undoubted conflict – is not necessarily involved herein inasmuch as Petitioner's conviction could be sustained under 18 U.S.C. §2(b), which permits treating a defendant as a principal if he has willfully caused a criminal act to be done.[1] The vice in this contention is that this case was not submitted to the jury on any such basis. Quite to the contrary, the trial record shows that in the critical colloquy at the bench prior to the instructions to the jury, the prosecution as well as the defense eschewed this theory; and the Court expressly declared that "the case has been tried on a different basis; on the basis that he is a direct principal" (Tr. 75).[2]

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[1] Section 2 of 18 U.S.C. reads in its entirety as follows:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

[2] "Tr." refers to the transcript of the proceedings at trial, a copy of which has been filed with the Clerk of this Court. Opp. 2, n. 1.

The pertinent portions of the trial record as as follows:[3]

> "MR BRANCH [the prosecutor]: In view of the allegation that the defendant caused the use of the wire communication facility, *perhaps we could ask for an instruction under Section 2* – United States Code – 18 U.S.C., Section 2. I want to know whether it really is necessary under the facts of this case. *The statute doesn't say anything about causing the use. It just says using it.* But the evidence is that –
>
> "THE COURT: *I think the case has been tried on a different basis; on the basis that he is a direct principal.*
>
> *"Do you have any objection to this?*
>
> "MR. SEAVY [defense counsel]: Well, that goes back to our theory, that 18 U.S.C., Section 2, doesn't have anything to do with it, and what Mr. Branch is saying now indicates to us that there is merit we think on the motion to dismiss.
>
> "MR. BRANCH: No, just the possibility. I don't think –
>
> "THE COURT: I think if anything should be given, the jury ought to be told that a person who is an agent to do an act would be in violation of the law. That's the way

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[3] Emphasis added throughout this Reply Brief.

I'd do it, *But, I don't think there is any need of – of giving it anyway. Maybe it would be better to leave it alone.*

"MR. SEAVY: *Okay. Then in making the argument, I don't have to be concerned about 18 U.S.C., Section 2.*

"THE COURT: *No*" (Tr. 74-75).

Accordingly, no Section 2 issue was presented to the jury and Petitioner's conviction cannot be sustained on any such basis. Surely the Government should not be permitted to dissaude this Court from reviewing this conviction upon a ground which the record demonstrates was deliberately never submitted to the jury. The Government cites the indictment as though the indictment, rather than the instructions to the jury and the understanding and agreement of both counsel and the District Court, describes the actual subsequent conduct of the case.

In plain legal truth and actual historical fact, the jury was not permitted to and did not consider the 18 U.S.C. §2 theory which the Government now proffers. And a conviction may not be sustained on appeal on a theory which was not submitted to the jury. *Cole v. Arkansas,* 333 U.S. 196 (1948); cf. *Spevack v. Klein,* 385 U.S. 511 (1967); *Russell v. United States,* 369 U.S. 749, 766 (1962).

Accordingly, the Government's primary plea of avoidance, that this case can be taken as involving Section 2 of Title 18 rather than Section 1084, falls and must be rejected. This case does indeed involve the Section 1084 issue on which there concededly is clear conflict.

2. The Government similarly relies upon the assertion that Petitioner might have been convicted of "*transmission* * * * of * * * information assisting in the placing of bets or wagers" as opposed to the *transmission*

* * * of bets or wagers" as precluding the clear presentation of the statutory issue in conflict, the interpretation and application of the term "transmission" (Opp. 5).[4] This contention is plainly frivolous, however, for the issue in conflict is whether "transmission" covers the *receipt* of telephone calls. That issue persists whether the calls are received in regard to placing bets or wagers or information assisting therein. On that issue, whether the mere receipt of such calls may constitute a violation of 18 U.S.C. §1084(a), there certainly is conflict: The Tenth Circuit in the decision below and the First Circuit are on one side; while the Seventh Circuit and this Court are on the other.[5] That issue is squarely presented in this case, inasmuch as

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[4] Again, the record refutes the Government. For the indictment, which the Government relied on for the other branch of its argument, as noted above, expressly charges "transmission" of both bets and information solely "*from* Monroe, Wisconsin, *to* Denver and Adams County, Colorado" (Petition, 7a-8a) and there is absolutely no evidence Petitioner was ever in Monroe, Wisconsin.

[5] The Government asserts that this Court's decision in *Telephone News System, Inc. v. Illinois Bell Telephone Co.*, 376 U.S. 782 (1964), is not in conflict with the decision below, because the issue "was not an integral part of the District Court's holding" (Opp. 3, n. 2). In fact, however, that case involved a constitutional attack against Subsection (d) of §1084 as well as the corresponding Illinois statute. The United States, which was the real party in interest, contended that the constitutional issue need not be decided because its action of seeking the cessation of telephone service could be sustained under Subsection (a), the very statutory provision involved in the instant case. Accordingly, disposition of the Subsection (a) issue was indeed an integral part of the District Court's holding. The Government simply misreads the case. Obviously, this Court would not have affirmed a constitutional holding if it could have avoided the constitutional issue on statutory grounds. Cf. *Parker v. Los Angeles County*, 338 U.S. 327 (1949); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947).

the evidence concededly shows that Petitioner initiated no calls.[6]

* * *

For the reasons stated herein and in the petition, this case presents a conflict among the Circuits as well as conflict with a decision of this Court on an important issue of Federal criminal law, evidently decided erroneously by the Court below, which requires resolution by this Court. This petition for a writ of certiorari should be granted.

Respectfully submitted,

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[6] The Government assays no response to the demonstration in the petition that the correct interpretation of the statute is contrary to the decision below and in accord with *United States v. Stonehouse*, 452 F.2d 455 (7th Cir. 1971), and *Telephone News Sytem, Inc. v. Illinois Bell Telephone Co.*, 220 F. Supp. 621 (N.D. Ill.), *affirmed*, 376 U.S. 782 (1964). By its silence the Government in effect concedes that the decision below is contrary to the express language enacted by the Congress, as was demonstrated in Point III of the petition (pp. 9-11).